STATE OF MICHIGAN

COURT OF APPEALS

ROBERT G. ZEICHMAN, Trustee of the ROBERT G. ZEICHMAN TRUST, U/A/D 4/13/81, and ROBERT G. ZEICHMAN and ROBERT C. ZEICHMAN, Co-Trustees of the MARY ANN ZEICHMAN TRUST, U/A/D 2/1/91,

Plaintiffs-Appellants,

v

ZEICHMAN MANUFACTURING, INC.,

Defendant-Appellee.

UNPUBLISHED
June 16, 2009

No. 281772
Kent Circuit Court
LC No. 07-002151-CK

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

This breach of contract action arises out of a lease agreement in which plaintiffs leased an industrial building to defendant. The original lease agreement was executed in late 2000 for $12,000 a month, and it provided that the rental amount would be adjusted after one year. In 2001, the parties formally amended the lease agreement (2001 Lease Amendment) to, among other things, change the method for determining the rent amount. Specifically:

> [Defendant] shall pay to [Plaintiffs], as rent … monthly … the sum of ($2,500) plus … the amount of the monthly payment of the first mortgage currently recorded against the Premises … *If Landlord renews, extends, refinances, or otherwise arranges for the modification of the payments due under the first mortgage, monthly rent shall be the amount of the new monthly payment of the new or modified first mortgage* … [Emphasis added.]

At the time, the mortgage payments were $14,625 a month, but shortly after the 2001 Lease Amendment, plaintiffs refinanced the mortgage to reduce the monthly payments to $13,249.34.

On October 13, 2003, defendant's president, John Boll, contacted Robert C. Zeichman (who communicated on behalf of plaintiffs) by email and explained that defendants were having

difficulty making the lease payments, that "we need to renegotiate the terms of the lease to a more realistic amount," and he hoped to "redo this lease." Zeichman responded:

> Regarding your message, we did reduce the rent payment when we refinanced the building a year ago. The way the lease is set-up is to pay the mortgage payments. The mortgage has a five-year balloon. I don't know of any way it can be renegotiated.

Boll replied, "[w]ell, we're going to have to."

Following these initial emails, Zeichman negotiated with Founders Trust Personal Bank (Founders) to reduce the monthly payment on the first mortgage. During the negotiations with Founders, Zeichman and Boll exchanged several more emails in which Boll repeated that defendant would not pay more than $9,000 a month in rent. On December 2, 2003, after approximately two months of negotiations with the bank, Zeichman sent Boll an email that stated in part that "[t]he bank has agreed to the $9,000 mortgage amount starting in December if the past dues can be addressed." Another individual on behalf of defendant replied to Zeichman with an email that stated in part:

> The purpose of this email is to accept the new building rent amount of $9,000.00 and to confirm our understanding of the payment schedule you proposed in the e-mail you set to John Boll. Does the $9,000 rent amount apply to the December payment only or does it apply to the September, October and November payments as well?

Zeichman's final email to defendant stated only that "[t]he new amount of $9,000 is for December forward."

During the email communications the parties never mentioned modifying or amending the 2001 Lease Amendment to sever the provision in the amendment that linked the rental payment to the monthly mortgage payment. Furthermore, the parties did not reference the additional $2,500 a month that defendant was required to pay in addition to the monthly mortgage rate pursuant to the 2001 Lease Amendment.

For the two years following the December 2003 emails, defendant paid plaintiffs monthly payments of $11,500 in rent ($9,000 monthly mortgage plus the additional $2,500). In December of 2005, Founders raised the monthly payment on the first mortgage back to $13,249.34 a month. Plaintiffs' counsel advised Boll that the rental payments would be increased to a total of $15,749.34 a month. Defendant refused to pay the increased amount. Plaintiffs then brought this breach of contract action, contending that defendant is bound by the terms of the 2001 Lease Amendment (specifically, a monthly rental amount of $2,500 plus the actual mortgage payment) because the parties did not mutually agree to modify the amendment. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and declined to grant plaintiffs' request for judgment pursuant to MCR 2.116(I)(2). Plaintiffs now appeals that order.

We review de novo a trial court's decision to grant summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). In addition, the existence and interpretation

of a contract involves a question of law we review de novo. *Bandit Industries Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). When reviewing a motion brought under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown*, *supra*. A moving party is entitled to summary disposition pursuant to MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." See *Lugo v Ameritech Corp*, 464 Mich 512, 520; 629 NW2d 384 (2001). "A genuine issue of fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ." *Campbell v Kovich*, 273 Mich App 227, 229-230; 731 NW2d 112 (2006). A court may grant summary disposition to the opposing party "'if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment.'" *Owczarek v State of Michigan*, 276 Mich App 602, 609; 742 NW2d 380 (2007), quoting MCR 2.116(I)(2).

A lease agreement for over one-year in length can be modified if the modification is in writing and signed by the party against whom it is to be enforced. MCL 566.1; *Adell Broadcasting Corp v Apex Media Sales Inc*, 269 Mich App 6, 11; 708 NW2d 778 (2005). There must be mutual assent to modify the contract and this requirement is satisfied "where a modification is established through clear and convincing evidence of a written agreement … establishing mutual agreement to waive the terms of the original contract." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373; 666 NW2d 251 (2003). The party advancing the claim that a modification occurred has the burden of showing by clear and convincing evidence that "the parties mutually intended to modify the *particular* original contract." *Id.* "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). ("'Meeting of the minds' is a figure of speech for mutual assent." *Id*.)

The crux of plaintiffs' argument is that the emails resulted in a reduction of the mortgage payments within the terms of the 2001 Lease Amendment, but did not operate as a waiver or modification of the amendment itself. We agree and find that the email messages fail to show clear and convincing evidence of a mutual agreement to modify the terms of the lease such that defendant was entitled to summary disposition. *Quality Products*, *supra*.

In this case, while Boll indicated that he wanted to "redo" or "renegotiate" "this lease," Zeichman never explicitly agreed to renegotiate, waive, modify, or amend the 2001 Lease Amendment. Instead, Zeichman responded to Boll's initial email by stating, "the rent is set-up to pay the mortgage … the mortgage has a five-year balloon" and "I don't know how it can be renegotiated." Boll did not respond to this email by demanding the terms of the 2001 Lease Amendment be altered so that the rent payment would no longer be based, in part, on the first mortgage payment. After his initial email, Zeichman consistently referenced the mortgage or the negotiations with Founders to lower the mortgage payment in the emails he sent to Boll, as opposed to referencing the terms of the lease. For example, at one point Zeichman stated "[w]e can get down to a mortgage payment of about $10,500" and "I have been in contact with the bank regarding the fee." When Founders ultimately agreed to modify the mortgage payments to $9,000 per month, Zeichman stated "[t]he bank has agreed to the $9,000 mortgage amount…"

Nothing in the email messages indicates Zeichman would have agreed or was agreeing to reduce the rent, which was the amount of the mortgage plus $2,500, regardless whether Founders agreed to lower the mortgage. In fact, Zeichman refused to allow defendant to apply the lower rate retroactively to months when the higher mortgage amount had to be paid. Furthermore, Zeichman's statement that the new amount of $9,000 was effective for "December forward" was in response to a direct question posed to him regarding retroactivity.

Additionally, if the adjustment was a modification, it was inconsistent with the formal amendment agreed upon in 2001. Rather, it was consistent with a similar rent adjustment made by plaintiffs in 2002. Here, unlike the 2001 formal agreement, there is no language in the emails stating that the parties agreed to modify or alter the lease agreement, and the emails were devoid of the essential terms of the lease agreement such as the duration of the lease and the requirement that defendant continue to pay the additional sum of $2,500 per month. In 2002, after plaintiffs refinanced the first mortgage with Founders and reduced the monthly mortgage payment to $13,249.34, defendant automatically had a lower monthly rent. Like the reduction at issue in this case, the 2002 reduction took place after the 2001 Lease Amendment, and in both circumstances defendant continued to pay the additional $2,500 as required by the amendment.

Finally, the language of the 2001 Lease Amendment indicates the parties were acting within the provisions of the lease agreement when the mortgage payment was reduced to $9,000. The amendment first states that rent is $2,500 plus an additional sum "equal to the amount of the monthly payment of the first mortgage … *If Landlord renews, extends, refinances, or otherwise arranges for the modification of the payments due under the first mortgage, monthly rent shall be the amount of the new monthly payment* …" (emphasis added). This language is broad, and allows the rent to fluctuate or be adjusted without waiving or requiring modification of the terms of the 2001 Lease Amendment. While Boll demanded a $9,000 monthly payment, he did not demand that plaintiffs rescind or modify the 2001 Lease Amendment. In addition to the plain language of the amendment, because the rent had been reduced after the 2001 amendment without any formal modification, defendant was aware the rent could be reduced without modification of the amendment itself.

In sum, we find that the emails fail to establish by clear and convincing evidence that the terms of the lease were modified. *Quality Products*, *supra*. Defendant was not entitled to summary disposition. Moreover, we find that there are no genuine issues of material fact existing with respect to whether a modification can be established by clear and convincing evidence. Thus, judgment for plaintiffs pursuant to MCR 2.116(I)(2) is appropriate. *Owczarek, supra.*

Our resolution of the contract issue renders resolution of plaintiffs' argument as to the application of the uniform electronic transaction act, MCL 450.831 *et seq.* unnecessary.

Reversed and remanded for entry of judgment for plaintiffs and further proceedings as the trial court therefore deems necessary and appropriate. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis